APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2427

Lee Krueger and Mary Delacour,
Appellees,

vs.

Don Fuhr,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: January 15, 1993
Filed: April 9, 1993

Before RICHARD S. ARNOLD, Chief Judge, MORRIS SHEPPARD ARNOLD, Circuit Judge, and HAMILTON,* District Judge.

HAMILTON, District Judge

Don Fuhr, a Springfield, Missouri police officer, appeals from the district court's[1] denial of his summary judgment motion. We reverse.

I.

In the early morning hours of June 6, 1989, Officer Don Fuhr was on patrol duty. By radio transmission, Officer Fuhr was

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* The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri, sitting by designation.

[1] The Honorable James C. England, United States Magistrate Judge for the Western District of Missouri, presiding by consent of the parties pursuant to 28 U.S.C. § 636(c) (1988 & Supp II 1990).

informed that an assault had occurred at the Tri-States Laundry and that the suspect was a "white/male wearing black shirt with number 12 on it and bluejeans," and "will be armed with a knife." (Joint Appendix at 195). The dispatcher also stated that canine security was possibly in pursuit of the suspect. A subsequent radio transmission indicated that the suspect's name was Leon Krueger and that he was possibly an escapee from Alpha House, a residential halfway house in Springfield, Missouri. (Joint Appendix at 198). Another officer communicated the suspect's probable location and stated that he was "suppose [sic] to be on drugs and very high and had some type of knife on him." (Joint Appendix at 199). Shortly thereafter, a second officer announced that the suspect had probably been spotted in the 1000 block of East Walnut.

Responding to this information, Officer Fuhr drove his police vehicle onto East Walnut. There he observed an individual fitting the description of the Tri-States Laundry assailant lying on his stomach between two parked automobiles. This individual was later identified as Leroy Krueger. Officer Fuhr exited his police vehicle, drew his service revolver, identified himself as a police officer and ordered Krueger to freeze. At that time, Leroy Krueger did not have a knife in his hand nor did Officer Fuhr notice a knife anywhere on Krueger's person.

Leroy Krueger began running down East Walnut and Officer Fuhr chased him for approximately 210 feet. Several times during this pursuit, Officer Fuhr ordered Krueger to freeze. When the officer had closed to within 3 to 4 yards of Krueger, he saw Krueger reach to the area of his right hip. He heard the sound of an object being pulled from Krueger's waistband area. Officer Fuhr testified at his deposition that Krueger pulled a knife from his waist band and was gripping it in his fist.

Officer Fuhr further testified that he believed that Krueger was going to turn and attack him with the knife. Officer Fuhr had

been running "as fast as [he] could run" (Joint Appendix at 48) and was fearful that he would be unable to stop in time to avoid the attack. Officer Fuhr slowed down, leveled his service revolver and fired four rounds at the center mass of Leroy Krueger's body. Two rounds struck Leroy Krueger in the back, a third round hit him in the base of the skull. Leroy Kruger died as a result of the wound to the base of the skull. During the subsequent investigation, a Springfield police officer found a knife with an exposed blade approximately 43 feet from the point where Krueger's right foot came to rest on the sidewalk.

Pursuant to 42 U.S.C. §1983 (1988), Lee Krueger and Mary Delacour, the natural parents of Leroy Krueger, filed this action for monetary damages against Don Fuhr and the City of Springfield. Plaintiffs allege that Office Fuhr violated their son's Fourth and Fourteenth Amendment rights by using excessive force when he shot and killed Leroy Krueger. On May 7, 1992, the trial court entered an order denying motions for summary filed by Don Fuhr and the City. Upon reconsideration, the trial court entered summary judgment in favor of the City of Springfield but reaffirmed its denial of Don Fuhr's summary judgment motion. On appeal, Don Fuhr contends that the district court erred when it found that genuine issues of material fact precluded entry of summary judgment and, in the alternative, that the court erred when it denied Office Fuhr's claim of qualified immunity.

II.

The district court has yet to enter its final judgment in this case. However, denial of a claim of qualified immunity is an appealable final decision within the meaning of 28 U.S.C. § 1291. *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). It is true that in *Moutray v. Butts,* No. 92-1745 (8th Cir. Feb. 8, 1993), this court declined to review a denial of summary judgment where the district court failed to explicitly address the defendant's claim of qualified immunity. While the district court opinions in the

instant case focused on the merits of the defendants' summary judgment motions and did not set forth the court's rationale in denying Defendant Fuhr's claim of qualified immunity, this court is satisfied that the district court did in fact deny Defendant Fuhr's summary judgment motion both on the merits and on qualified immunity grounds.[2] Therefore, we conclude that we have jurisdiction to consider this appeal. Moreover, on appeal from a denial of qualified immunity this court has jurisdiction to resolve the case on the merits. *Gometz v. Culwell,* 850 F.2d 461, 463 (8th Cir. 1988).

Summary judgment is appropriate when there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). When presented with a summary judgment motion, the court must determine whether any factual issues exist that may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). The substantive law determines which facts are relevant and which are immaterial. Only disputes that might affect the outcome will properly preclude summary judgment. *Id.* at 248; *Get Away Club, Inc. v. Coleman,* 969 F.2d 664, 666 (8th Cir. 1992). In making this determination, the court must view the facts in the light most favorable to the non-moving party, giving such party the benefit of all reasonable inferences to be drawn from the facts. *St. Paul Life & Marine Inc. Co. v. Federal Deposit Ins. Corp.,* 968 F.2d 695, 699 (8th Cir. 1992).

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[2] The District Court's opinion discusses only Fuhr's defense "on the merits," and not his qualified immunity defense. But the Court notes that Fuhr's motion for summary judgment asserts the defense of qualified immunity, and its opinion then denies the motion without qualification. We read this as a rejection of qualified immunity, notwithstanding the opinion's failure to discuss the issue explicitly. However, we take this opportunity to suggest that district court clearly address the qualified immunity issue.

III.

The Fourth Amendment protects citizens from unreasonable search and seizure.[3] There is no question but that Officer Fuhr's actions constituted a seizure within the meaning of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Thus, the issue before the court is whether Officer Fuhr's use of deadly force to apprehend LeRoy Krueger was reasonable within the meaning of the Fourth Amendment.

It is well settled that police officers may use some degree of force in effecting a lawful arrest. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Determining whether the use of force is reasonable in any given instance requires careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *Garner*, 471 U.S. at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). The use of deadly force is constitutionally reasonable in certain limited circumstances:

> Where the office has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or other, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Garner, 471 U.S. at 11-12. *See also Ryder v. Topeka*, 814 F.2d 1412, 1419 (10th Cir. 1987) (fleeing suspect poses threat of

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[3] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . U.S. Const. amend. IV.

serious harm when he places officer in dangerous life-threatening situation or is fleeing from the commission of inherently violent crime). An officer's compliance with this standard must be assessed from the point of view of a reasonable officer on the scene. *Graham,* 490 U.S. at 396.

On appeal, Officer Fuhr contends that the district court erred when it held that the distance the knife was found from Krueger's body and the fact that the bullets struck Krueger in the back create genuine issues of material fact. Officer Fuhr maintains, and we agree, that these facts are not material to a determination of whether the shooting was objectively reasonable.

It is undisputed that, at the time he first encountered Leroy Krueger, Officer Fuhr knew that a man fitting Krueger's description was suspected of committing an armed assault at the Tri-States Laundry. It is also undisputed that Officer Fuhr had been informed that the suspect was fleeing from police and was believed to be on East Walnut. Under those circumstances, it was objectively reasonable for Officer Fuhr to believe that the individual he was chasing had committed a crime involving the infliction or threatened infliction of serious physical harm. Furthermore, Officer Fuhr also knew that the suspect probably had a knife and was inebriated. It was objectively reasonable for Officer Fuhr to believe on the basis of this information he faced a serious and immediate danger of physical harm when Leroy Krueger pulled, or seemed to pull, a knife from his waistband.

Lee Krueger and Mary Delacour maintain that there is a genuine factual dispute as to whether their son actually had a knife at the time of the shooting. In support of this contention, Plaintiffs note that the knife was found approximately 43 feet from Krueger's right foot. They also suggest that the sound of a knife being pulled from a waistband is insufficiently loud or distinctive to be identified over the sound of running footsteps. Finally, Plaintiffs note that Officer Fuhr testified that the knife

appeared to be the same color as Leroy Krueger's hand. Plaintiffs conclude that a reasonable fact-finder could determine on the basis of this evidence that Krueger was not armed at the time of the shooting.

Plaintiffs misapprehend the nature of the Fourth Amendment reasonableness inquiry. Reasonableness must be determined from the point of view of a reasonable officer in the situation, "rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. An erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectively reasonable. *Id.* We have already concluded that Fuhr's belief that he was facing an armed and dangerous suspect was objectively reasonable. Therefore, even assuming that Plaintiffs were able to establish that Krueger was unarmed at the time of the shooting, that fact would not preclude entry of judgment for Officer Fuhr.

Nor is the fact that Leroy Krueger was shot in the back sufficient to establish a genuine issue of fact regarding the reasonableness of Officer Fuhr's actions. Plaintiffs rely on *Samples on Behalf of Samples v. Atlanta*, 846 F.2d 1328 (11th Cir. 1988) for the proposition that a wound in the back raises serious issues of material fact regarding the use of excessive force. In *Samples*, the court of appeals reversed the district court's entry of summary judgment for the police officer in an excessive force case. The court determined that the evidence, including the fact that one of the six shots the officer fired hit plaintiffs' decedent in the back, raised serious factual disputes regarding the use of excessive force.

However, *Samples* is distinguishable from the instant case. The defendant officer in *Samples* claimed that his use of force was reasonable because the victim had been advancing on him with a knife when the shots were fired. The court determined that while it was possible to reconcile the officer's story with the

physical evidence, the evidence also supported other contradictory explanations of the events leading up to the shooting. In the instant case, there is no evidence that requires us to attribute special significance to the fact that Officer Fuhr shot Krueger in the back. As Officer Fuhr notes, it is not remarkable that an escaping felony suspect would be shot in the back.

The second prong of the *Garner* test is whether the use of deadly force was necessary to prevent escape. It is undisputed that Krueger was fleeing police apprehension at the time of the shooting. *Compare Daniels v. Terrell,* 783 F.Supp. 1211 (E.D.Mo. 1992) (officer's use of deadly force objectively reasonable when plaintiff fired on officer and was running from police) *with Fitzgerald v. Patrick,* No. 88-0499-CV-W-5, 1990 U.S. Dist. LEXIS 1406. (W.D. Mo. Feb. 5, 1990) (suspect in trailer surrounded by police officers was not fleeing). It is true that other police officers were in the general area and it is possible, though not certain, that another officer might have apprehended Krueger if he eluded Officer Fuhr's foot pursuit. However, the Fourth Amendment does not require police officers to forgo the use of deadly force to prevent their own death or serious physical injury whenever there is a possibility that another officer might later apprehend the fleeing suspect. *See e.g. Fraire v. Arlington,* 957 F.2d 1268, 1276 (5th Cir.) *cert. denied* 113 S.Ct. 462 (1992) (use of deadly force to prevent officer's own death or serious bodily harm was justified); *Reese v. Anderson,* 926 F.2d 494, 501 (5th Cir. 1991) (where suspect reached several times for firearm, officer justified in using deadly force to defend himself and others even where suspect "totally surrounded" by police officers). Thus, we conclude that Officer Fuhr's use of deadly force was necessary to prevent escape in accordance with the standards enunciated in *Garner.*

Finally, *Garner* requires the officer to give a warning "where feasible." Officer Fuhr ordered Krueger to freeze when he first encountered Krueger lying between two cars on East Walnut

Street, and several times during the pursuit. There is no evidence that he gave a warning immediately prior to the shooting. However, we are satisfied that under the urgent circumstances facing Officer Fuhr, the absence of a warning immediately preceding the shooting does not render his use of deadly force constitutionally unreasonable.

Because we conclude that Officer Fuhr's actions were objectively reasonable and therefore did not violate Leroy Krueger's Fourth Amendment rights, it is not necessary to reach Appellant's contention that the district court erred when it denied his claim of qualified immunity.

IV.

We reverse and remand to the district court for entry of summary judgment in favor of Don Fuhr.

A true copy.

Attest:

CLERK: U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 89-3445-CV-S-4

LEE KRUEGER and MARY DELACOUR,
Plaintiffs,

v.

DON FUHR and CITY OF SPRINGFIELD, MISSOURI,
Defendants.

ORDER

[Filed: May 7, 1992]

This matter comes before the Court on Defendants' Motions for Summary Judgment. For the reasons set forth herein, the Summary Judgment Motions will be overruled.

A motion for summary judgment will be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). In determining whether a genuine issue regarding a material fact exists, the pleadings must be construed in favor of the non-moving party. The non-movant must, however, resist a summary judgment motion by setting forth specific facts that show there is a genuine issue of fact for trial. Fed. R. Civ. P. 56(e); *Burst v. Coors,* 650 F.2d 930, 932 (8th Cir. 1981). The motion may then be granted only if there is no substantial evidence in support of that party's position. *Thibodaux v. Atlantic Richfield Co.,* 580 F.2d 841, 844 (5th Cir. 1987), *cert. denied,* 442 U.S. 909

(1979). While summary judgment is an extreme remedy, the Court must recognize its salutary purpose to avoid a useless, expensive, and time-consuming trial where there is no genuine, material issue to be tried. *Anderson v. Viking Pump Div.*, 545 F.2d 1127, 1129 (8th Cir. 1979).

A brief statement of the facts of this case is as follows: LeRoy Krueger (hereinafter "Krueger"), a Missouri state parolee who had absconded from supervision, entered onto the premises of the Tri-States Laundry Service, where he had been employed. An employee of the laundry, Robert Christy, claims that he saw Krueger with a knife in his hand with a four-inch blade. An altercation ensued, the facts of which are in dispute. According to Christy, Krueger verbally threatened him, scratched his car with the knife, and the police were called. According to Michael Porter, Krueger's cousin, Krueger called him and told him that Christy had been chasing him and hit him with a car. Defendant Don Fuhr, who was on patrol duty, heard the information of his police radio, describing Krueger, his attire, location, and the fact that he had a knife. While enroute to the Laundry, Fuhr received additional information by radio that Krueger was believed to be an Alpha House escapee, Leon Krueger, and was possibly on drugs and very high. He then received radio information regarding the suspect's location. As Fuhr approached that location, he observed the suspect lying on the pavement between two automobiles. He approached Krueger, drew his service revolver, identified himself as a police officer, and allegedly yelled for Krueger to freeze. Krueger got up, and began to run away. The officer did not see a knife. He claims to have tried unsuccessfully to trip Krueger, whereupon the suspect continued to flee. The pursuit continued, with the officer shouting for the suspect to freeze more than once, for about 210 feet, according to Fuhr. The officer claims to have been running as fast as he could, that he was about 3 to 4 yards behind Krueger, and that he saw him reach his hand to the area of his right hip, along the waistband or pocket, and withdraw an object. Fuhr states that he

heard the sound of an object being pulled from the suspect's waistband that sounded like metal against leather, and then saw a knife blade in Krueger's fist, silhouetted against the pavement. Believing that he was in immediate danger, and fearing that he would not be able to stop if Krueger turned on him with the knife, the officer fired four rounds at Krueger, striking him twice in the back and once in the base of the skull, and missing with one round. A knife, fitting the description given by witnesses, was found 43 feet from Krueger's body. An autopsy revealed that the shot to the base of the head killed Krueger, and that his blood alcohol level was between 0.19 and 0.214 at the time of his death.

It is Defendant Fuhr's position that he is entitled to summary judgment because his use of deadly force to apprehend a fleeing felon armed with a deadly weapon was reasonable. He also contends, alternatively, that he is entitled to qualified immunity because his actions did not violate any clearly established law. Defendant City of Springfield asserts that the use of deadly force was reasonable, and that Plaintiffs have failed to plead and prove the existence of an unconstitutional policy, custom or procedure that is attributable to the City, and have failed to establish that a policy or custom of the City was the proximate cause of a constitutional deprivation to Krueger.

Defendants contend that all Officer Fuhr knew at the time the shots were fired was that he was chasing a violent escaped felon, reportedly high on drugs or alcohol, who had assaulted individuals with a knife a few minutes earlier. They argue that Fuhr was confronted with a situation requiring split-second decision making, that Krueger had refused to halt and was avoiding apprehension, and that he pulled a knife when the officer was dangerously close to him. Therefore, deadly force was reasonable under the circumstances.

Plaintiffs argue that the mere fact that Krueger was shot in the back raises an issue of fact that precludes summary judgment.

They point out that Fuhr had admitted in his deposition that the sound he heard was similar to that made by a hand against pants. Plaintiffs assert that the sound had to have been heard over the sound of footsteps and any any heavy breathing occurring during the pursuit. They also suggest that the silhouette might have been produced by Krueger's open right hand. Plaintiffs contends that the evidence is not clear that Krueger was armed with a knife at the time he was shot, and that even if he had been, the officer was in no immediate danger unless Krueger turned on him. They assert that Krueger had no opportunity to throw the knife after he was shot, and that the knife was not found where it might be expected in relationship to his body had he been holding it as Fuhr alleges. Plaintiffs also contend that defendant City of Springfield is not entitled to summary judgment because the city had a policy that permitted Fuhr to shoot Krueger in the back without a showing of imminent danger to the officer or others.

After carefully reviewing the record in the light most favorable to plaintiffs, the Court finds that we cannot rule, as a matter of law, that there are not genuine factual issues regarding the reasonableness of Defendant Fuhr's actions. Both the distance that the knife was found from the body, and that fact that three bullets struck Krueger in the back, create factual issues regarding the question of excessive force, which makes the case inappropriate for summary judgment. It appears to the Court, that based on the evidence before us and the reasonable inferences that can be drawn therefrom, there exists a question regarding the reasonableness of Defendant Fuhr's response. *See Graham v. Conner*, 409 U.S. 386 (1989) (holding that the reasonableness inquiry in excessive force cases involves examination of the question of whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them). For the same reasons, it cannot be said as a matter of law that Defendant City of Springfield's policy and training regarding the amount of force to be used under these circumstances did not violate the constitutional rights of Krueger.

Because plaintiffs have set forth specific facts showing that there may be a genuine issue for trial, defendants are not entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(e).

For the foregoing reasons, pursuant to 28 U.S.C. Section 636(b)(1) and Local Rule 22, it is therefore

ORDERED that the defendants' motions for summary judgment be, and are hereby, overruled.

/s/ James C. England
JAMES C. ENGLAND
United States Magistrate

Date: 5/7/92

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 89-3445-CV-S-4

LEE KRUEGER and MARY DELACOUR,
Plaintiffs,

v.

DON FUHR and CITY OF SPRINGFIELD, MISSOURI,
Defendants.

ORDER

[Filed: June 10, 1992]

Defendants have filed a joint motion to set aside and reconsider this court's order denying Defendants' motion for summary judgment.

In the Order denying Defendants' summary judgment motion, this court held that we cannot rule, as a matter of law, that there are not genuine factual issues regarding the reasonableness of Defendant Fuhr's actions, relying on *Graham v. Conner,* 490 U.S. 386 (1989). Defendants contend that, to the extent that the court based its ruling on the "objective reasonableness test" stated in *Graham,* the court has applied the wrong test.

Having carefully scrutinized the case law that has evolved since the Supreme Court decided *Graham,* the court is confident that the correct test was applied in this case. Since the *Graham* decision, whether an officer used excessive force has been governed by the "objective reasonableness" standard of the Fourth Amendment. *Hunter v. District of Columbia,* 943 F.2d 69, 76 (D.C. Cir. 1991); *Curnow v. Ridgecrest Police,* 952 F.2d 321 (9th Cir. 1991); *Hopkins v. Andaya,* No. 89-16368, 1992 U.S. App. LEXIS 5024 (9th Cir. Mar 24, 1992).

In *Graham*, the Court explained that it was "mak(ing) explicit what was implicit" in *Tennessee v. Garner*, 471 U.S. 1, 7-9 (1985), that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham*, 490 U.S. at 395 (emphasis in original). The Court recognized that standard is not capable of "precise definition or mechanical application." *Id.* at 396. Rather, the court must consider all of the facts and circumstances of each case, including the severity of the crime occasioning the arrest, whether the suspect posed an immediate threat to the safety of the officer or anyone else, and whether he actively resisted arrest or attempted to flee. *Id.* While the court should avoid reliance upon hindsight and should take into consideration the officer's need to make split-second judgments at the time he acted, the test is, in the end, still the objective reasonableness of his conduct. *Id.*

A recent Ninth Circuit case demonstrates the application of *Garner* and *Graham* in a case where an individual was killed by a police officer, and the appellate court affirmed the district court's denial of summary judgment. *Curnow*, 952 F.2d at 324-25. The facts of the case involved the police investigating a domestic situation where they found the decedent allegedly slapping a woman, and observed him with a rifle. The police attempted to break down the door, got into the house, yelled "freeze, police," and when the decedent raised his weapon, an officer shot and seriously wounded him. *Id.* at 323. The decedent then attempted to exit the house, and turned and pointed the weapon at officer, at which time he was shot and killed. The woman's statement was that the decedent was not hitting her, that he did not reach for his gun before the police shot him, and that it appeared he had been shot in the back by the first shot. She also stated that the gun was not loaded, and that the decedent had grabbed it by the muzzle as he attempted to flee. *Id.* The court

held that, "(u)nder (her) version of the shooting, the police officers could not reasonably have believed the use of deadly force was lawful because (decedent) did not point the gun at the officers and apparently was not facing them when they shot him the first time. Thus, viewing the evidence in the light most favorable to the nonmoving party, the defendants-appellants are not entitled to qualified immunity." *Id.* at 325.

Based on the facts as they have been presented in this case, the Court is confident that the ruling denying the summary judgment motion for Defendant Fuhr was appropriate. We make this ruling cognizant that the factual conflicts might be resolved in Defendant Fuhr's favor at trial, but it is not our job to resolve these conflicts on a motion for summary judgment. *Hopkins*, LEXIS 5024, at *17.

Defendant City has more fully articulated its position in its motion to reconsider the court's order denying summary judgment, emphasizing that Standard Operating Procedure No. 400 completely incorporated the language of *Garner*, and that police officers are trained to shoot at center body mass only in situations in which the officer is authorized to discharge his firearm in accordance with that procedure. It is true, as Defendant City has reiterated, that Plaintiffs have not raised a genuine, material factual issue regarding how the City's policy or training does not comply with constitutional requirements. According, the court finds it appropriate to set aside its order and grant summary judgment for Defendant City.

It is therefore

ORDERED the Defendant City's motion to set aside the court's order be, and is hereby, granted. Accordingly, it is further

ORDERED that Defendant City's motion for summary judgment be, and is hereby, granted. It is further

ORDERED that Defendant Fuhr's motion to set aside the court's order be, and is hereby, denied.

/s/ James C. England
JAMES C. ENGLAND
United States Magistrate

Date: 06/10/92

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2427WMS

Lee Krueger and Mary Delacour,
Appellees,

vs.

Don Fuhr,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

The petition for rehearing by the panel is denied

June 1, 1993

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit